Supreme Court, U.S.
FILED
97 2023 JUN 15 1998
OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States
October Term 1997

Rudy NEIRA, Pro Se
Petitioner

v.

Bandera County Fresh Water Supply District No. 1

On Petition For Review
To The Texas Supreme Court

PETITION FOR WRIT OF CERTIORARI

Rudy Neira, Pro Se
3843 Barrington #138
San Antonio, Tx 78217

210 967-7125 office
210 967-4726 home

44 pp

This case is about a monthly water standby fee imposed on Mr. Neira, and other vacant lot owners, by the Bandera County Fresh Water Supply District # 1 (Bandera water district).

Mr. Neira's federal question is that the Bandera water district's water standby fee is a tax with sufficient disparity to constitute taking of property from Neira, and from other vacant lot owners, in violation of both the due process clause and equal protection of the law clause of the Fourteenth Amendment of the United States Constitution.

A secondary federal question is that Neira's case dismissal by the state's highest court constitutes a decision for Court jurisdiction purposes.

14.1(b) LIST OF PARTIES

Petitioner:
Rudy Neira, Pro Se, 3843 Barrington #138, San Antonio, Tx 78217 210 967-7125 office 210 967-4726 home

Bandera County Fresh Water Supply District Board Members:
Wilbur L. Bradford, President, Rt 4 Box 4505,
Lakehills, Tx 78063
William C. Mooney, Rt Box 2426, Lakehills, Tx 78063
Kenneth W. Edwards, Rt Box 4561, Lakehills, Tx 78063
Gary V. Pickett, PO Box 672, Lakehills, Tx 78063

Respondent Attorney of Record:
Henry Steen, Jr.
Law Office of Henry Gates Steen, JR., P.C.
3001 North Lamar Blvd. Suite 306
Austin, Tx 78705

14.1(c) TABLE OF CONTENTS

	Page
14.1(d) Citations of Official and Unofficial Reports of Orders and Opinions Entered in the Case.	1
14.1(e) Concise Statement of the Basis for Jurisdiction.	2
14.1(f) The Constitutional Provisions Violated.	2
14.1(g) Concise Statement of the Case Setting Out the Facts Material to Consideration of the Questions Presented.	2
14.1(h) Concise Argument (per rule 10) that State's Highest Court has decided an important question of federal law in a way that conflicts with relevant decisions of the Court.	4
	Appendix
14.1(i)(i) Appendix-Judgment Sought to be Reviewed & In Conjunction Documents (in descending date order):	
Dismissal by State Highest Court	9
Petition to State Highest Court (partial)	10
Rehearing Denial by State Appeal Court	15
Rehearing Petition to State Appeal Court (partial)	16
Opinion of Judgment Sought to be Reviewed	20
Judgment Sought to be Reviewed	26
Appeal to State Appeal Court (partial)	27
Dismissal by State Lower Court	30
Neira's Motion for New Trial (partial)	32
14.1(i)(ii) Appendix-Relevant Documents (in ascending Order):	
9-5-90 Relevant Companion State Case	34
10-22-93 TNRCC State Agency Letter	35
10-2-97 TNRCC State Agency Letter	37
3-25-98 Public Interest Letter	39

For clarity to the Court, Neira uses bold style for text referenced in appendix. Entry and filing dates are also in bold.

14.1(c) TABLE OF CITED AUTHORITIES

Brinkerhoff-Faris Trust Co. v. Hill, 281 U.S. 673, 677-78 (1930)

Furey v. Sacramento (1986, CA 9 Cal) 780 F2nd 1448

New York ex rel. Bryant v. Zimmerman, 278, U.S. 63, 67 (1928).

Norwood v. Baker, 172 U.S. 269, 19 S.Ct 187, 43L.Ed.443(1898)

Rogers v. Alabama 192 U.S. 226, 230-31(1904)

Slochower v Board of Higher Education (1956) 350 US 551, 100 L Ed 692, 76 S Ct 637, reh den 351 US 944, 100 L Ed 1470, 76 S Ct 843.

Street v. New York, 394 U.S. 576 (1969)

United States v. Donovan, 429 U.S. 413, 422 (1977)

14.1(d) CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES (in descending date order)

"Today, the Supreme Court of Texas, dismissed the petitioner's petition for review for want of jurisdiction in the above numbered and styled case." See 3-26-98 Dismissal by State Highest Court Appendix page 9.

"After examination of the record in the above styled and numbered cause the Court DENIES Appellant's Motion for Rehearing." See 11-25-97 Rehearing Denial by State Appeal Court Appendix page 15.

"In our letter of September 5, 1997 we suggested, as an option, the discontinuance of the standby fee and the reaching of a settlement with the property owners. We, again, encourage the district to do that and to find an equitable revenue generating alternative." See 10-2-97 TNRCC State Agency Letter Appendix page 37.

"Additionally, the District maintained that its fee was lawful. We agree.[1]" See 9-24-97 Opinion of Judgment Sought to be Reviewed Appendix page 20.

"As modified, the judgment of the trial court is AFFIRMED." See 9-24-97 Judgment Sought to be Reviewed, Appendix page 26.

"ACCORDINGLY, the motion of Bandera County Fresh Water Supply District #1 to dismiss the above numbered and entitled case because the applicable statute of limitations had expired prior to the inception of the case is hereby granted." See 5-20-96 Dismissal by State Lower Court Appendix page 30.

"As a general proposition, districts can exercise only that authority clearly stated by the legislature. If such a position is applied to the issue in question, we would conclude that FWSD's have no authority to assess standby fees." See 10-22-93 TNRCC State Agency Letter Appendix page 35.

[1] We acknowledge Graham v. City of Lakewood Village, 796 S.W.2nd 800, 804. App.-Fort Worth 1990, writ denied), where the court found municipal water standby fees to be an illegal tax. Graham is inapposite because the court relied on sections of the Water Code and Local Government Code that are not applicable to this case. Id. at 802-03

14.1(e)(i-iv) CONCISE STATEMENT OF THE BASIS FOR JURISDICTION:

(i) The judgment sought to be reviewed is part of an unpublished opinion by a state appellate court. Both are dated September 24, 1997. See Judgment Sought to be Reviewed Appendix page 26. (ii) Rehearing for the above judgment sought to be reviewed was denied on November 25, 1997. See Rehearing Denial by State Appeal Court, Appendix page 15.

Discretionary review by the state's highest court was denied on March 26, 1998. See Dismissal by State Highest Court Appendix page 9. Section (iii) is not applicable. (iv) The statutory provision which confers on the Court jurisdiction is 28 U.S.C. Section 1257. (v) Pursuant Rule 29(c), notification was made to the Attorney General of Texas that 28 U.S.C. section 2403(b) may apply and that the Constitutionality of a Texas statute has been drawn into question.

14.1(f) CONSTITUTIONAL PROVISIONS VIOLATED:

The constitutional provisions violated are the due process clause and the equal protection of the law clause of the Fourteenth Amendment as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

These provisions were violated through "taking of property" from Mr. Neira and from other vacant lot owners.

14.1(g) CONCISE STATEMENT OF THE CASE SETTING OUT THE FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED:

Neira First Raises Federal Question:

The "taking of property" federal question was first raised by Neira, at his first opportunity, on a rehearing petition to a state appeal court. See point of error #7 of Rehearing Petition to State Appeal Court, Appendix pages 17 &18.

The state appeal court denied Neira's appeal. See Rehearing Denial by State Appeal Court, Appendix page 15.

Neira repeated his "taking of property" federal question with issue #7 and issue #7 argument of his petition for review with the state's highest court. See Petition to State Highest Court, Appendix pages 12 & 13.

The state's highest court dismissed the case for want of jurisdiction. See Dismissal by State Highest Court, Appendix page 9.

Neira's rehearing petition to the state appeal court constitutes the first chance to present the federal question.

State Appeal Court Raises Federal Question:

On its own initiative, the state appeals court raised the federal question by ruling that the Bandera Water District standby fee was legal. The state appeal court stated, in its opinion, "Additionally , the District maintained that its fee was lawful. We agree." See Opinion of Judgment Sought to be Reviewed, Appendix page 25.

Previously, the lower court had only ruled that the statute of limitations had expired. See Dismissal by State Lower Court, Appendix page 30. Neira appealed lower court's dismissal with five points of error all of which addressed only the limitations issue. See Appeal to State Appeal Court, Appendix page 27 for five points of error. See 14.1(h) for Neira's contentions on raising federal question issues.

14.1(h) PER RULE 10, CONCISE ARGUMENT THAT STATE'S HIGHEST COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THE COURT:

The state highest court has decided on Mr. Neira's "taking of property" federal question because Mr. Neira timely and properly raised the federal question.

Federal Question Raised Timely:

The "taking of property" federal question was timely because it was created by an unexpected decision of the state appeal court, giving Neira no prior opportunity to assert the federal question. See Brinkerhoff-Faris Trust Co. v. Hill.

A lower court's summary judgment was made at a pretrial conference where Neira's case was dismissed solely on expiration of limitations. See Dismissal by State Lower Court, Appendix page 30. Only limitations, and not Neira's three causes of action, was decided in lower court. See Neira's Motion for New Trial Appendix page 32 for Neira's three cause of actions.

After the lower court dismissal, Neira only appealed limitations issues, with five points of error, to the state appeals court. See Appeal to Appeal State Court, Appendix page 27. Neira anticipated that regardless if limitations had expired or not, the state appeals court would remand Neira's three cause of actions to the lower court for trial on merits.

The appeals court surprised Neira by ruling only on one of his three cause of actions, by dismissing the case, and by leaving two cause of actions unresolved. Appeal Court ruled that, based on state statute, the water standby fee was lawful. The appeal court opinion stated "Additionally, the District maintained that its fee was lawful. We agree." See Opinion of Judgment Sought to be Reviewed, Appendix page 25. The State Appeal court did not rule or remand on Neira's second cause of action "for declaring that the fee is grossly unfair". Neira raised his second cause of action as point of error #4 in his Rehearing Petition to the State Appeal Court. See Rehearing Petition to State Appeal Court, Appendix page 16.

Federal Question Raised Properly:

At his first opportunity, Neira raised the taking of property federal question in point of error #7 of his Rehearing Petition to State Appeal Court. See Appendix pages 17 & 18 for error #7. Neira's rehearing was denied. See Rehearing Denial by State Appeal Court Appendix, page 15. Neira then raised the taking of property federal question with the state highest court. See Issue#7 and issue#7 argument in Petition to State Highest Court, Appendix pages 12 & 13.

Neira's federal question was timely and properly raised but both the state highest court and the state appeal court merely evaded the federal question. And this mere evasion constitutes a decision. See Rogers v. Alabama and Street v. New York.

> Texas Appellate Procedure Rule 185 states:
> "The Supreme Court will not affirm or reverse a judgment or dismiss a writ of error for defects or irregularities in appellate procedure, either of form or substance, without allowing a reasonable time to correct or amend such defects or irregularities."

Neira did not receive any notice of defects or irregularities from either the Texas Supreme Court or the state appeal court. He was diligent in following procedure.

> Texas Rules of Appellate Procedure Rule 132 states:
> "In all cases where the Supreme Court is without jurisdiction of the case as presented in the application, it will dismiss the application with the docket notation "Dismissed for Want of Jurisdiction." The Court may accompany the denial of an application with such explanatory remarks as it may consider appropriate."

Texas Appellate Rules 110, 111, 112, 113 and 114 specify procedures for certified questions but not federal questions. As an appeal from a small claims, the rules or more liberal. Texas Small Claims Government Code section 28.051 states "Trial on appeal is de novo. No further pleadings are required and the procedure is the same as in small claims court."

The state highest court has decided Neira's taking of property federal question. See New York ex rel, Bryant v. Zimmerman.

14.1(h) cont.-There is Conflict With the Court:

The state highest court decided on the "taking of property" federal question in a way that **conflicts** with the Court.

Furey v. City of Sacramento states:

> "In Norwood the Supreme Court held that a local government takes private property without just compensation when, through a special assessment on land, it compels landowner to pay for a public improvement in an amount "in substantial excess of the special benefits accruing to him."

Slochower v. Board of Higher Education states:

> "Protection of individual from arbitrary action is very essence of due process of law".

Neira contends that the Bandera water district standby fee is a special tax assessment. As a tax assessment, it is arbitrary, excessive, and highly discriminatory to Mr. Neira (and other owners of vacant lots who do not use water) as compared to homeowners who use water. Neira and the other vacant lot owners can not vote on the water fees/taxes or water usage rates. Home owners pay a similar water standby fee/tax and get the first 5000 gallons of water free. Neira has no water meter and has never used water. The Bandera water district has placed a lien on Neira's property for non payment of the standby fee.

Based on property valuations researched by Neira, the tax assessment on Neira and other vacant lot owners is about 20 times higher than the rate imposed on homeowners. Homeowners pay $12 per month standby fee while non metered lot owners, such as Neira, pay $10 per month. Home owners pay separately for use of water.

The 20 times higher figure is based on Mr. Neira's lot value of $3,000 and an average water district's board member home/lot value of $77,000. Normal changes in valuations of lots and homes will not significantly change the "20 times" disparity.($10/$3000 divided by $12/$77000 is 21.34 rounded to 20.) Simply omitting the value of homes in assessing the standby fee, discriminates against owners of vacant lots and constitutes taking of property.

14.1(h) cont.-Important Federal Question Exists:

The 20 times higher tax assessment, which Neira contends, constitutes an **important** federal question of taking of property in violation of the due process and equal protection clauses of the Fourteenth Amendment.

If not resolved, the state's decision can adversely affect tax payers in the same water district, taxpayers in many other taxing entities, and the general public.

In discussing the Court's certiorari jurisdiction before the American Bar Association in 1949, Chief Justice Vinson stated:

> "Those of you whose petitions for certiorari are granted by the Supreme Court will know, therefore, that you are, in a sense, prosecuting or defending class actions; that you represent not only your clients, but tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country."

Neira strongly believes that this case is about tremendously important constitutional principles and that it is his civic duty to do his part in protecting these principles.

14.1(h) cont.-Important Federal Question Exists (Other Contentions)

United States v. Donavan states:

> "In tax cases it can sometimes be shown that the issue is one of continuing importance under successive revenue acts and that widespread litigation will continue until the point is settled by the Supreme Court."

In 1990 a state appeal court ruled that a similar water standby fee was an "illegal tax", yet in Neira's case, a different state appeal court has ruled that the standby fee is legal. See Opinion of Judgment Sought to be Reviewed, Appendix page 25 for state ruling that standby fee is legal. See 9-05-90 Relevant Companion State Case, Appendix page 34 for state court ruling that standby fee is illegal tax.

Neira is aware of other litigations on this standby fee issue. Widespread litigation may continue if this issue is not resolved by

the Court. An October 22, 1993 state agency letter by the Texas Natural Resource Conservation Commission (TNRCC), states:

> "The question of whether a fresh water supply district ("FWSD") is authorized to impose standby fees, has been presented to this agency on several occasions. The unique challenges posed by this question is evidenced by the myriad of opinions set forth in past agency correspondence." See 10-22-93 TNRCC State Agency Letter Appendix page 35.

A recent TNRCC letter has instructed the Bandera Water District to discontinue the standby fee and has suggested imposing an "equitable revenue generating alternative". See 10-2-97 TNRCC State Agency Letter, Appendix page 37.

A public interest letter from the Regional Clean Air and Water Association states "This issue is of substantial continuing importance since demand for clean water throughout the United States appears to be increasing." See Appendix page 39.

14.1(i)(i) APPENDIX

DISMISSAL BY STATE HIGHEST COURT:

The Supreme Court Of Texas
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312
March 26, 1998

Mr. Henry Steen, Jr.
3001 North Lamar Blvd. Suite 306
Austin, Tx 78705

RE: Case Number 98-0015
Court of Appeals Number: 04-96-00739-CV
Trial Court Number 673-94

Style: Rudy Neira v. Bandera County Fresh Water Supply District No. 1

Dear Counsel:

Today, the Supreme Court of Texas, dismissed the petitioner's petition for review for want of jurisdiction in the above numbered and styled case.

Sincerely,

s/Courtland Crocker
John T. Adams, Clerk
by
Courtland Crocker, Deputy

cc: Mr. Herb Schaefer, Clerk
Ms. Bernice Bates
Mr. Rudy Neira

Rudy Neira, Pro Se

PETITION TO STATE HIGHEST COURT (partial):

NO. 98-0015
In the Supreme Court of Texas

Rudy Neira, Pro Se, Petitioner

VS.

Bandera County Fresh Water Supply District
No. 1, Respondent

On Appeal from 4th Supreme Judicial District of Texas in San Antonio, Texas
as Number 04-96-00739-CV

and as county trial court Number 673-94

PETITION FOR REVIEW

Mailed certified to Texas Supreme Court
on: **January 5, 1998**

Filed by:
Rudy Neira, Petitioner Pro Se
3843 Barrington #138
San Antonio, Tx 78217
210 967-4726 Home 210 967-7125 Home

Respondent Attorney of Record:
Henry Steen, Jr
Law Office of Henry Gates Steen, JR., P.C.
3001 North Lamar Blvd. Suite 306
Austin, Tx 78705

53.2(f) ISSUES PRESENTED

ISSUE #1- Supreme Court review is justified to resolve material construction of Texas law for the Water District's standby fees imposed prior to September 1, 1995. The court of appeals ruled that the District's standby fee is lawful while Mr. Neira contends that the District's standby fee is unlawful, for this period. Mr. Neira contends that the court of appeals quotes old vague Texas statute compared to Mr. Neira's more specific and more recent Texas statute. (See Appendix page 6 & 7 of Opinion for court of appeals "ruling".)

ISSUE #2- Supreme Court review is justified to resolve material construction of Texas law for the District's standby fee imposed after September 1, 1995. The court of appeals contends that the Water District's standby fee is lawful under the new Chapter 49 of the Texas Water Code regardless if the Water District has applied for authorization. While Mr. Neira contends that the District's fee is unlawful until it gets approval as required by section 49.231 of the Water Code. (See Appendix page 6 & 7 of Opinion.)

ISSUE #3- Supreme Court review is justified to resolve true conflict between courts of appeals. In this appeal, the fourth court of appeals in San Antonio is ruling that the Water District's standby fee is lawful (Appendix page 6 of Opinion), while the Fort Worth Court of Appeals ruled in 1990 that a similar water standby fee was an illegal tax. See Graham v. City of Lakewood Village. Even if the two above cases are not found sufficiently similar for a ruling in favor to Mr. Neira, Supreme Court review is still needed for establishing Texas constitutionality of the District's water standby fee. Mr. Neira contends that the District's standby fee is a tax. And as a tax, Mr. Neira contends that the District's standby fee is at a rate which is arbitrary, highly discriminatory, and in violation of the Texas Constitution.

ISSUE #4- Supreme Court review is justified to resolve material construction of Texas rule number 166a concerning validity of Mr. Neira's issue-of-fact cause of action that "District's standby fee is grossly unfair." The court of appeals has found that "the issues are legal rather than factual" to support summary judgment. (See Appendix first paragraph of page 3 of Opinion.)

ISSUE #5- Concerning Mr. Neira's $1433 billed and not yet paid, Supreme Court review is justified to resolve construction of Texas Rule 166a and limitations statute on Mr. Neira's contention that he preserved a cause of action "for declaring that the BCFWSD#1 standby fee is not authorized by law as required by law." (See Mr. Neira's first cause of action in "Plaintiff's Original Petition" Record Index page 053.) The court of appeals, on the other hand, contends that Mr. Neira "...does not seek declaratory or injunctive relief..., has no damages and no cause of action..." Mr. Neira contends that this cause of action is valid and therefore the statute of limitations had not expired for his $1433 debt portion of his suit. (See Appendix page 6 of Opinion.)

ISSUE #6- Along similar lines as in issue #5 above, Supreme Court review is justified to review construction of Texas statutes to show if the statute of limitations has expired for $721.35 standby fees which Mr. Neira paid on or about October 27, 1994 via Commerce Land Title Company.

ISSUE #7- Supreme Court Review is justified to resolve construction and application of the U S Constitution 14th Amendment. The Court of Appeals ruled that the standby fee is legal while Mr. Neira contends that this ruling is in violation of the U.S. Constitution. Mr. Neira contends the District's standby fee is a tax and that it is at a rate about 20 times higher on lot owners, such as Mr. Neira, compared to home owners. (See Furey v. Sacramento for U.S. Constitutional issue and see Opinion page 6 for Court of Appeals ruling that standby fee is lawful.)

ISSUE #8- Supreme Court review is justified in order to resolve construction of Texas limitations statute section 16.004. Mr. Neira contends that he used sufficient diligence, through administrative procedure to toll the statute of limitations for his $650 water fees paid in 1986 and for his $1329 which he paid in 1988...

...**ISSUE #7 ARGUMENT- The Court of Appeals ruled that the standby fee is legal while Mr. Neira contends that this ruling is in violation of the U.S. Constitution. Mr. Neira contends that the District's standby fee is a tax and that it is at a rate about 20 times higher on lot owners, such as Mr. Neira, compared to home owners. (See Furey v. Sacramento for U.S.**

Constitutional issue and see Opinion page 6 for Court of Appeals ruling that standby fee is lawful.)

Section 109 of the Fourteenth Amendment states: "Local government takes private property without just compensation, when, through special assessment on land, it compels landowners to pay for public improvement in amount substantially in excess of special benefits to him." Furey v. Sacramento (1986, CA 9 Cal) 780 F2nd 1448.

Mr. Neira, as the Record shows, is claiming that the fee/tax is at least 20 higher on him and other lot owners as compared to the fee/tax imposed by the Water District on home owners. As a non water user, Mr. Neira and other lot owners, receive little benefit as compared to the benefits received by home owners.

Section 21 of the US Fourteenth Amendment states: "Violation of due process clause may be accomplished by state judiciary in course of construing otherwise valid state statute." Bouie v. Columbia (1964) 378 US 347,12 L Ed 2nd 894, 84 S. Ct...

...53.2(J) PRAYER FOR RELIEF- In conclusion, Mr. Neira's most significant argument is, first, that the Water District's standby fee is unlawful because in not only violates Texas Water Code but more importantly it violates the Texas and United States Constitutions. The standby fee is a tax and is grossly discriminatory towards vacant lot owners, such as Mr. Neira. Secondly, the statute of limitations has not expired, especially for Mr. Neira's $1433 owed and not yet paid and for accrued amounts.

Pursuant Rule 60.2 Mr. Neira respectfully requests that the Texas Supreme Court reverse the lower courts judgments in whole and render a judgment that the Water District's standby fee:
(1) is a tax on land,
(2) does not include value of improvements on the land,
(3) is a grossly discriminatory tax against vacant lot owners such as Mr. Neira as compared to home owners, and
(4) is in violation of the Texas Constitution.

or that the Supreme Court grant reverse the lower courts judgments and remand the case for further proceedings.

or that the Supreme Court grant appropriate relief to which Mr. Neira is entitled.

Petition for Review Respectfully Submitted,
s/Rudy Neira
Rudy Neira, Petitioner **Jan 5-98**
3843 Barrington St. #138 Date Signed
San Antonio, Tx 78217
210 967-7125 Office 210 967-4726 Home

Rudy Neira, Pro Se

REHEARING DENIAL BY STATE APPEAL COURT:

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
300 DOLOROSA, SUITE 3200
BEXAR COUNTY CRIMINAL JUSTICE CENTER
SAN ANTONIO, TEXAS 78205-3037
HERB SCHAEFER, CLERK

November 25, 1997

Rudy Neira
3843 Barrington #138
San Antonio, Tx 78217

Henry Steen, Jr.
LAW OFFICES OF HENRY GATES STEEN, JR.P.C.
Steen Building, Suite 306
3001 N. Lamar Boulevard
Austin, Tx 78705

RE: Court of Appeals Number: 04-96-00739-CV
Trial Court Case Number: 673-94

Style: Rudy Neira
v.
Bandera County Fresh Water Supply District #1

Dear Rudy Neira and Counsel:

After examination of the record in the above styled and numbered cause the Court DENIES Appellant's Motion for Rehearing.

ORDERED the day and year first above written.

Very truly yours,
HERB SCHAEFER, CLERK
s/Joyce
JOYCE WIATREK, DEPUTY CLERK

Rudy Neira, Pro Se

REHEARING PETITION TO STATE APPEAL COURT
(Partial):

No. 04-96-00739-CV

In the Court of Appeals for the
Fourth Supreme Judicial District of Texas
San Antonio, Texas

Rudy Neira, Pro Se, Appellant

vs.

Bandera County Fresh Water Supply District No.1, Appellee

On Appeal from Bandera County Court
Cause 673-94

APPELLANT'S MOTION FOR REHEARING

Submitted on **November 5, 1997**

Appellant, Pro Se:
Rudy Neira
3843 Barrington #138
San Antonio, Tx 78217
210 967-4726 Home 210 967-7125 Office

Appellee Current Attorney of Record:
Henry Steen, Jr.
Law Offices of Henry Gates Steen, JR.,P.C.
3001 North Lamar Blvd. Suite 306
Austin, Tx 78705

...SUMMARY OF POINTS OF ERROR

(1) The Court of Appeals erred in ruling that the Water District's fee is lawful--for the period prior to September 1, 1995 (See last paragraph of page 6 of Opinion)

(2) The Court of Appeals erred in ruling that the Water District's fee is lawful-- for the period after September 1, 1995 (See last paragraph of page 6 of Opinion. See Court's holding in Point of Error #1.)

(3) The Court of Appeals erred in holding that the District's fee is not a tax. This holding is in contradiction to the Fort Worth Court of Appeals holding. Graham v. City of Lakewood Village, 796 S.W. 2nd 800, 804, App-Fort Worth 1990. (See last paragraph of page 6 of Opinion for fee lawful ruling)

(4) The Court of Appeals erred in holding that "the issues are legal rather than factual." Mr. Neira's second cause of action, for declaring that the fee is grossly unfair, is clearly an issue of fact. (See 1st paragraph of page 3 of Opinion for issues-are-legal holding.)

(5) The Court of Appeals erred in holding that Mr. Neira "... does not seek declaratory or injunctive relief..., has no damages and no cause of action.." and that therefore Mr. Neira can not sue for "the $1433 billed to him but not yet paid". (See page 6 of Opinion)

(6) The Court of Appeals erred in holding that Mr. Neira has not paid subsequent bills. (See page 6 of Opinion for mention of not paying subsequent bills)

(7) The Court of Appeals erred in ruling that the Water District fee is lawful--in violation of the Fourteenth Amendment of the United States Constitution.

(8) The Court of Appeals erred in holding that Mr. Neira's use of administrative procedure failed to toll the statute of limitations.

(9) The Court of Appeals erred in not granting Mr. Neira's motion for summary judgment. Instead, the Court granted the Water District's motion for summary judgment. (See Transcript Index page 049 for Mr. Neira's motion for summary judgment titled "Plaintiff's Response to Defendants Motion for Summary Judgment and Plaintiff's Counter Motion for Summary Judgment".)...

...POINT OF ERROR #7

Point of Error #7 Summarized

The Court of Appeals erred in ruling that the Water District fee is lawful--in violation of the Fourteenth Amendment of the United States Constitution.

Ruling that the Water District fee is lawful is in violation of the US Fourteenth Amendment Due Process Provision. Section 109 of the Fourteenth Amendment states:

"Local government takes private property without just compensation, when, through special assessment on land, it compels landowners to pay for public improvement in amount substantially in excess of special benefits to him." Furey v. Sacramento (1986, CA 9 Cal) 780 F2nd 1448.

Mr. Neira, as the Record shows, is claiming that the fee/tax is at least 20 higher on him and other lot owners as compared to the fee/tax imposed by the Water District on home owners. As a non water user, Mr. Neira and other lot owners, receive little benefit as compared to the benefits received by home owners.

Section 21 of the US Fourteenth Amendment states:

"Violation of due process clause may be accomplished by state judiciary in course of construing otherwise valid state statute." Bouie v. Columbia (1964) 378 US 347,12 L Ed 2nd 894, 84 S. Ct...

...RELIEF

Mr. Neira respectfully requests that this Honorable Court (1) sustain the points of error in this Motion for Rehearing, (2) reverse its Opinion, (3) hold all points of error in Mr. Neira's Brief of Appellant (4) reverse the Court Order requiring Mr. Neira to pay appeal cost, (5) and hold that the Water District acted in bad faith pursuant Texas Rule 166-A. Mr. Neira further requests all other appropriate relief to which he may be entitled.

Appellant's Motion For Re Hearing
Respectfully Submitted,

s/Rudy Neira

Rudy Neira, Appellant
3843 Barrington St. #138
San Antonio, Tx 78217
210 967-7125 Office 210 967-4726 Home

Nov 5-97
Date Signed

Rudy Neira, Pro Se

OPINION OF JUDGMENT SOUGHT TO BE REVIEWED:

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT OF TEXAS
SAN ANTONIO
OPINION
No. 04-96-00739-CV

Rudy NEIRA,
Appellant
v.
BANDERA COUNTY FRESH WATER SUPPLY DISTRICT #1
Appellee

From the County Court at Law, Bandera County, Texas
Trial Court No. 673-94
Honorable James C. Onion, Judge Presiding

Opinion by: Paul W. Green, Justice

Sitting: Catherine Stone, Justice
Paul W. Green, Justice
Karen Angelini, Justice

Delivered and Filed: **September 24, 1997**

AFFIRMED AS MODIFIED

The appellant, Rudy Neira, sued the Bandera County Fresh Water Supply District No. 1 (the District), for assessing an illegal and unfair "water standby fee." The trial court granted the Districts motion for summary judgment and dismissed Neira's suit based on limitations. In five points of error, Neira contends the trial court erred because the evidence is legally and factually insufficient to establish his claim is barred by limitations. We reform the judgment to indicate Neira take nothing by his suit and, as modified, affirm the judgment.

Summary of Facts

In 1985, the District assessed a fee against Neira and other Bandera County landowners for making water available, even if the water was not used. Although Neira attended public hearings and conducted an extensive letter-writing campaign, he was not able to stop the District from charging him what he considered an illegal and unfair standby fee. On March 22, 1994, Neira sued the District in small claims court to recover both past and future fees. Neira secured a default judgment, but the District obtained a new trial. A jury subsequently awarded Neira $5028, which included fees paid in 1988 for the years 1985 to 1988, $1433 for fees billed but not paid as of October 1994, plus interest and expenses.

The District appealed to the county court where it filed a motion for summary judgment claiming (1) Neira failed to state a cause of action; (2) Neira's suit was barred by limitations; (3) Neira's suit was barred by res judicata; [2] and (4) the fees were lawful. The District prayed Neira's suit be dismissed because "the applicable statute of limitations had expired before the inception of the case." Neira appealed that decision.

Standard and Scope of Review

We treat the dismissal in this case as a summary judgment for purposes of appellate review. See Dearing v. Johnson, 947 S.W.2nd 641, 644 (Tex. App.-Texarkana 1997,n.w.h.); In re A.L.J., 929 S.W.2nd 467,469-70(Tex. App.-Tyler 1996, writ denied). We also decline to dismiss this appeal or affirm the judgment based on the state of the record, as the District urges we must do. Contrary to the District's assertions, the transcript contains both its motion for summary and Neira's response. Additionally, a statement of facts is not required. Morriss v. Enron Oil & Gas Co., 948 S.W.2nd 858, 872 (Tex. App.-San Antonio 1997, no writ). Furthermore, the presumption of correctness cited by the District does not apply when, as here, the issues are legal rather than factual. See Gupta v. Ritter Homes. Inc., 633 S.W. 626, 628 (Tex. App.-Houston(14th Dist.) 1982),Aff'd in part & rev'd in part on other grounds, 646 S.W.2nd

---

[2] The District apparently bases its res judicata argument on a suit to collect delinquent fees it filed against Neira and settled in the late 1980's.

168 (Tex. 1983).

When a defendant moves for summary judgment based on an affirmative defense, it must establish all elements of the defense as a matter of law. Zale Corp. v. Rosembaum, 520 S.W.2nd 889, 891 (Tex. 1975). Once the movant/defendant has established a right to summary judgment, the burden shifts to the nonmovant/plaintiff to present issues which preclude summary judgmert. City of Houston v. Clear Basin Auth., 589 S.W. 2nd 671, 678 (Tex. 1979).b

A defendant seeking summary judgment on limitations must prove when the cause of action accrued and must negate the discovery rule whenever the plaintiff invokes it. Burns v. Thomas, 786 S.W.2nd 266,267 (Tex. 1990); Gregg v. Galo, 720 S.W.2nd 116, 119 (Tex. App.-San Antonio 1986, no writ). A cause of action accrues is a question of law for the court to decide. Moreno v. Sterling Drug, Inc., 787 S.W.2nd 348,351 (Tex. 1990). Similarly, the court decides the applicable statute of limitations as a question of law. Williams v. Khalaf, 802 S.W.2nd 651,658 (Tex. 1990).

Discussion

1. Fees Paid

Neira contends the District failed to show that limitations barred his claim for $1329, the amount he paid for fees assessed from 1985 to 1988. More specifically, Neira contends there is no statute of limitations for illegal taxes. He also asserts that his cause of action accrued on October 22, 1993 and that it was tolled while he exhausted administrative remedies. We disagree with Neira's arguments.

Neira claims limitations do not apply in this case because the District's assessment is a tax to which Ratcliff v. City of Hurst, 593 S.W.end 863 (Tex. Civ. App.-Fort Worth 1980, writ ref'd n.r.e.)applies. In Ratcliff, the court refused to apply the two-year statute of limitations to taxpayers challenging a municipality's ad valorem taxes because, until the city's property annexation was invalidated, the taxpayers had no standing to sue. 593 S.W.2nd at 864. In other words the court did not hold that limitations were inapplicable to illegal taxes. Id. at 865; see also Bowles v. Reed, 913 S.W.2nd 652, 657 (Tex. App.-Waco 1995, writ denied)

(declining to extend Ratcliff to collection of bail bond fees).

We therefore hold that limitations apply to Neira's claims and further hold that a two-year statute applies. See Bowles v. Clipp, 920 S.W.2nd 752, 759-60 (Tex. App.-Dallas 1996, writ denied); Ratcliff, 593 S.W.2nd at 865. Before Applying the two-year statute of limitations, we ask whether Neira's cause of action accrued on October 22, 1993, when he received a letter from the Texas Natural Resource Conservation Commission (TNRCC) which criticized the standby fees and "opened the door to file suit." The letter states, in part:

> "As a general proposition, districts can exercise only that authority clearly stated by the legislature. If such a position is applied to the issue in question, we would conclude that (fresh water supply district's) have no authority to assess standby fees.
>
> However, because of the history of standby fee legislation for other types of districts, we have previously taken the position that the imposition of standby fees by a (fresh water supply district) would not require approval by the Commission, but may be subject to review pursuant to the Commission's general supervisory powers."

The TNRCC letter did not change the facts surrounding the assessment but rather offered Neira his first glimpse at a favorable legal position. In other words, the letter did not raise material facts issues about when Neira's right to seek a legal remedy arose. Thus, Neira's cause of action came into existence in 1988 when he paid the fees.

We conclude Neira's cause of action was barred by limitations when he filed suit in 1994, unless the accrual date was tolled. Neira argues without authority specific to his situation, that he was required to exhaust administrative remedies with the Water Commission and TNRCC before bring suit. Such is not the case, however. Cf. Glasscock Underground Water Conservation Dist. v. Pruit, 915 S.W.2nd 577, 580 (Tex. App.-El Paso 1996, no writ) (explaining exhaustion of administrative remedies not applicable when the issue involves only question of law or statutory

interpretation); Martinez v. Hardy, 864 S.W.2nd 767, 774-74(Tex. App.-Houston (14th Dist.) 1993, no writ) (stating doctrine of exhaustion of remedies does not preclude suit "(w)here the legislature has elected not to require resort to an administrative agency"); Hoover v. Gregory, 835 S.W.2nd 668, 673-74(Tex. App.-Dallas 1992, writ denied) (starting limitations when a tax deficiency was assessed, not when it was affirmed by the administrative body). Neira is not entitled to tolling or a later accrual date based on his complaints to the Water Commission and TNRCC.

The trial court did not err in granting the District summary judgment on Neira's claims for fees paid because they were barred by the applicable statute of limitations. Accordingly, we overrule Neira's third point of error specifically addressing limitations, as well as Neira's fifth point of error addressing administrative remedies. We also overrule Neira's fourth point of error, regarding whether he properly paid the fees under protest, because the issue is not relevant to limitations.

2. Fees Not Paid

In his first point of error, Neira maintains the District failed to show that limitations barred his claim for $1,433, which represents a bill for fees he owed but did not pay through October 1994. In his second point of error, Neira contends the District failed to show that limitations barred his claim for any debt beyond the $1,433. In reply, the District maintains Neira's suit is restricted to the recovery of money already paid. To the contrary, while Neira's petition does not seek declaratory or injunctive relief, he prays for recovery of the $1,433 billed to him but not yet paid. The District's summary judgment proof failed to address which fees were applicable to which year. Therefore, the trial court erred in applying limitations and granting the District summary judgment on Neira's claim for $1,433. Accordingly, we sustain Neira's first and second points of error.

However, we need no reverse he summary judgment; we can affirm the summary judgment on any meritorious theory advanced in the motion for summary judgment. For example, the District argued that Neira failed to state a cause of action. We agree. If Neira did not pay his 1994 bill (or subsequent bills), then

he has no damages and no cause of action).

Additionally, the District maintained that its fee was lawful. We agree.[3] Under the Water Code applicable until 1995, the District was empowered to assess fees against water users. Act of July 19, 1919, 36 Leg., 2d C.S.,ch 48, section 16, 1919 Tex. Gen. Laws 107, 111, repealed by Act of May 25, 1995, 74th Leg.,R.S., ch. 715, section 42, 1995 Tex. Gen. Laws 3755, 3803 (effective Sept.1, 1995) (former TEX. WATER CODE ANN. section 53.107). The current Water Code clearly defines "users" as those to whom water is made available. TEX. WATER CODE ANN. section 49.212(a)(Vernon Supp. 1997)(stating water districts "may adopt and enforce all necessary charges, fees, or rental, in addition to taxes, for providing or making available any district facility or service"); id. section 49.231 (discussing standby fees).[4]

Conclusion

Although we sustain two points of error, we hold the trial court did not err in granting the District summary judgment. However, we note limitations is an affirmative defense which, when sustained, requires a take-nothing judgment. See Rhodes v. McCarron, 763 S.W.2d 518, 521(Tex. App.-Amarillo 1988, writ denied). Accordingly, we reform the trial court's dismissal judgment to indicate Neira take nothing by his suit against the District and, as reformed, we affirm the judgment.

PAUL W. GREEN,
JUSTICE

DO NOT PUBLISH

Rudy Neira, Pro Se

---

[3] We acknowledge Graham v. City of Lakewood Village, 796 S.W.2nd 800, 804. App.-Fort Worth 1990, writ denied), where the court found municipal water standby fees to be an illegal tax. Graham is inapposite because the court relied on sections of the Water Code and Local Government Code that are not applicable to this case. Id. at 802-03

[4] "(A) curative statute enacted by the Legislature, and becoming effective during the pendency of an appeal, writ of error, or even a motion for rehearing on a case to which it applies, cures the defect the same as if such act had become effective before the institution of the suit." Brown v. Truscott Indep. Sch. Dist., 34 S.W.2d 837, 840(Tex. Comm'n App. 1931, judjm't. adopted).

JUDGMENT SOUGHT TO BE REVIEWED:

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT OF TEXAS
SAN ANTONIO

JUDGMENT

No. 04-96-00739-CV
Rudy NEIRA,
Appellant
v.
BANDERA COUNTY FRESH WATER SUPPLY DISTRICT NO. 1, Appellee
From the County Court at Law, Bandera County, Texas
Trial Court No. 673-94
Honorable James C. Onion, Judge Presiding

BEFORE JUSTICE STONE, JUSTICE GREEN, AND JUSTICE ANGELINI

In accordance with this Court's opinion of this date, the judgment of the trial court is MODIFIED as follows to substitute all references to summary judgment. The decretal language is modified as follows:

> ORDERED, ADJUDGED AND DECREE that Rudy Neira take nothing from his suit against Bandera County Fresh Water Supply District No. 1.

As modified, the judgment of the trial is AFFIRMED.

It is ORDERED that appellee, Bandera County Fresh Water Supply District No. 1, recover its cost of this appeal from appellant, Rudy Neira, and from American Bankers Insurance Company of Florida as surety on appellant's cost bond.

SIGNED **September 24, 1997**
s/ PAUL W. GREEN
PAUL W. GREEN
JUSTICE

Rudy Neira, Pro Se

APPEAL TO STATE APPEAL COURT (partial):

N0. 04-96-00739-CV
IN THE COURT OF APPEALS FOR THE
FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS
SAN ANTONIO, TEXAS

RUDY NEIRA, PRO SE, APPELLANT
v.
BANDERA COUNTY FRESH WATER SUPPLY DISTRICT #1
APPELLEE
On appeal from the Bandera County Court
Cause 673-94
The Honorable James C. Onion Presiding

BRIEF OF APPELLANT

SUBMITTED ON **OCTOBER 10-96**

Appellant, Pro Se:
Rudy Neira 3843 Barrington #138
San Antonio, Tx 78217
210 967-4726 Home 210 967-7125 Office

Appellee Current Attorney of Record:
Vilhelm Hesness
100 Congress Avenue #2000
Austin, Tx 78701

ORAL ARGUMENT REQUESTED...

...Five Points of Error

Point of Error #1. The trial court erred in rendering expiration of statute of limitations and rendering case dismissal, because the water district did not establish as a matter of law nor with sufficient evidence that the statute of limitations had expired for $1,433 debt, an amount being billed by the water district to appellant at time of original September 30, 1994 trial. (See "29-Page Statement of Facts" pages 6,7,8, & 13. See Transcript Index page 236 and page 37 of "Attachments" for copy of bills. See Transcript Index page 224 motion for new trial document bottom of page 7 and top of page 8 for reference to billed amount.)

Point of Error #2. The trial court erred in rendering expiration of statute of limitations and rendering case dismissal, because the water district did not establish as a matter of law nor with sufficient evidence that the statute of limitations had expired for that portion of appellant's(Neira's) debt which has accrued beyond the $1,433 debt amount. (Same references and arguments are use here as in above Point of Error #1.)

Point of Error #3. The trial court erred in rendering expiration of statute of limitations and rendering case dismissal, because the water district did not establish as a matter of law nor with sufficient evidence that the statute of limitations had expired for $1,329, and amount paid by the appellant(Neira) to appellee in 1988. (See "29-Page Statement of Facts" pages 14,16,17,&18. See Transcript Index page 224 and item "(1) bottom of page 5, all of page 6, and most of page 7.)

Point of Error #4. The trial court erred in rendering expiration of statute of limitations and rendering case dismissal, because the water district did not establish as a matter of law nor with sufficient evidence that appellant(Neira) is required by law to protest and that appellant failed to properly "protest" the $1329 paid by appellant to water district in 1988. (See Transcript Index page 236 page 6 of Index document titled "Attachment" to motion for new trial for Slaughter v. Sundown. Also, see Transcript Index page 224, motion for new trial document, item "(b)" on page 6 for several paragraphs on appellant paying in protest and not voluntarily arguments.)

Point of Error #5. The trial court erred in rendering expiration of statute of limitations and rendering case dismissal, because the water district did not establish as a matter of law nor with sufficient evidence that appellant's pursuing of administrative procedure, failed to toll the statute of limitations. (See "29-Page Statement of Facts" middle of page 27 for October 22-93 TNRCC letter.)...

...Prayer for Relief

Appellant, Rudy Neira, prays that this curt reverse the case dismissal granted by the trial court and remand this cause to the trial county court for further proceedings and for such other and further relief to which appellant may show himself justly entitled.

Appellant further prays that, to further administration of justice, the trial court be changed from Bandera County to another county. The appellee is a public water utility and consists of many water users, all of whom will be adversely affected by a judgment in favor of appellant.

Appellant's Brief Respectfully Submitted,

s/Rudy Neira
Rudy Neira, Appellant
3843 Barrington #138
San Antonio, Tx 78217
210 967-7125 Office 210 967-4726 Home

Oct 10,1996
Date Signed

Rudy Neira, Pro Se

DISMISSAL BY STATE LOWER COURT:

ORDER DISMISSING CASE

On April 17, 1996, the motion of plaintiff for a pre-trial conference under Rule 166 of the Texas Rules of Civil Procedure came on before the Court. At the time and place scheduled for such conference the defendant, in accordance with Rule 166(a), urged the Court to consider whether the case should be dismissed because the statute of limitations had expired prior to the inception of the case. The Court, having heard the argument of counsel for defendant and the pro se plaintiff, and having reviewed the pleadings herein, finds:

1. That this case is before the Court on appeal from a September 30, 1994, judgment entered in the Justice Court of Bandera County, Precinct No. 1.
2. That the judgment was based on a claim to recover water fees paid since 1985, related court cost, and 10% interest since 1985 on the water fees.
3. That the underlying fee was paid on December 27, 1988.
4. That the petition initiating this case was filed on March 22, 1994.
5. That the longest applicable statute of limitations, under Section 16.004(a)(3) of the Texas Civil Practice and Remedies Code, is four years from the date the contested fee (or tax) was paid.
6. That the case was filed after the statute of limitations had expired.
7. That the plaintiff has not established directly or indirectly that any reason for tolling the statute of limitations exists.

ACCORDINGLY, the motion of Bandera County Fresh Water Supply District #1 to dismiss the above numbered and entitled case because the applicable statute of limitations had expired prior to the inception of the case is hereby granted. It is therefore,

ORDERED, ADJUDGED AND DECREED that the above numbered and entitled case be the same is hereby DISMISSED.

SIGNED: **May 20, 1996**

s/James C. Onion
Judge Presiding

APPROVED AND ENTRY REQUESTED:

s/ Vilhelm Hesness
State Bar No. 09548300
Attorney for Bandera County Fresh Water Supply District #1
100 Congress Ave., Suite 2000
Austin, TX 78701
(512) 469-5500
(512) 469-6306 (FAX)

APPROVED AS TO FORM ONLY:

_____

Rudy Neira, pro se
2250 Holly Hall, No. 167
Houston, Tx 77054
(713) 799-1340

Rudy Neira, Pro Se

NEIRA'S MOTION FOR NEW TRIAL (partial):

Cause No. 673-94

Rudy Neira
v.
Bandera County Fresh
Water Supply District
#1 (BCFWSD#1)

In the County Court
Bandera County Texas

Plaintiff's Motion To Vacate Judgment
And For New Trial

Comes now, Rudy Neira, plaintiff, and files this Motion to vacate judgment and grant a new trial. An oral judgment dismissing this case was rendered by this court at the April 17,1996 pre-trial conference for above captioned case. This judgment dismissed this case on defendant's oral pleading that the four-year statute of limitations had run out. Plaintiff (Neira) assumes that Leslie v. City of Dallas, a case personally handed to plaintiff (Neira) by defendant during this pre-trial conference, was also provided to the court as part of pleading. (For copy of Leslie v. City of Dallas see "Neira's Right to Sue" sections of Attachments.

In support of his motion plaintiff (Neira) would show as follows:

I.
Background Prior To The
April 17, 1996 Pre-Trial Conference

Background and Court Jurisdiction:

This case is on appeal from a plaintiff's (Neira's) suit filed in the Bandera County Justice of the Peace as a Sall Claims suit. Plaintiff was granted a judgment in his favor in Small Claims Court on September 30, 1994 and plaintiff was awarded $5028 of which $65 was for court costs. Then on October 11,1994 defendant (BCFWSD#1) filed an appeal of the Small Claims judgment.

During the April 17, 1996 Pre-Trial Conference, the court

questioned the jurisdiction of this court over plaintiff's cause of actions. At this time it appears appropriate to repeat plaintiff's prior causes of action and to repeat court cases which support that this court has jurisdiction over plaintiff's causes of action. On or about May 8, 1996 plaintiff filed "Plaintiff's Original Petition" which listed three causes of action as follows:

(1) "Plaintiff (Neira) files first cause of action for declaring that the BCFWSD#1 standby fee is not authorized by law and is therefore illegal."

(2) "Plaintiff files second cause of action for declaring that the BCFWSD#1 standby fee is grossly unfair to plaintiff."

(3) "Plaintiff files a third cause of action for declaring that BCFWSD#1 presented a motion for summary judgment in bad faith."

The first two cause of actions are the same as the September 30, 1994 Small Claims cause of actions...

...Plaintiff' Motion to Vacate Judgment and For New Trial Respectfully Submitted,

s/Rudy Neira **April 22, 1996**

Rudy Neira
Home 713 799-1340
Office 210 871-7072

Rudy Neira, Pro Se

14.1(i)(ii) APPENDIX

9-05-90 RELEVANT COMPANION STATE CASE:

GRAHAM v. CITY OF LAKEWOOD VILLAGE
Cite as 796 S.W.2d 800 (Tex.App.-Fort Worth 1990)

Frank D. GRAHAM, Judith Futerfas, William A. Grahaïm, Frank Hardy, Steve Konahison, and Betty Kittleson, Appellants,
v.
CITY OF LAKEWOOD VILLAGE, Texas, a General Law Municipality,
Appellee.
No. 2-89-276-CV

Court of Appeals of Texas
Fort Worth.

Sept. 5, 1990

Owners of vacant lots brought suit seeking declaratory judgment that ordinance imposing "standby fee" of $25 per month for vacant lots that have water and sewer service immediately available was unconstitutional. The 211th District Court, Denton County, R.C. Vaughan, J., ruled in favor of city, and owners appealed. The Court of Appeals, Ashworth, J. (Retired), held that monthly fee which city charged to owners of vacant lots because of the availability , as opposed to actual use, of water and sewer services constituted an illegal tax.

Reversed and remanded.

Rudy Neira, Pro Se

10-22-93 TNRCC STATE AGENCY LETTER:

John Hall, Chairman Pam Reed, Commissioner
Peggy Garner, Commissioner
Anthony Grigsby, Executive Director

TEXAS NATURAL RESOURCE
CONSERVATION COMMISSION

Protecting Texas by Reducing and Preventing Pollution
October 22, 1993

Rudy Neira
2250 Holly Hall #167
Houston, Texas 77054

Re: Bandera County Fresh Water Supply District No. 1
Investigation No. 9306218

Dear Mr. Neira:

Thank you for your inquiry by way of Senator Rodney Ellis with regard to standby fees imposed by the Bandera County Fresh Water Supply District No. 1 ("District"). We have reviewed the statutes and prior agency correspondence related to this practice and are now able to provide the following information.

The question of whether a fresh water supply district ("FWSD") is authorized to impose standby fees, sometimes referred to as water availability fees, has been presented to this agency on several occasions. The unique challenge posed by this question is evidenced by the myriad of opinions set forth in past agency correspondence.

As a general proposition, districts can exercise only that authority clearly stated by the legislature. If such a position is applied to the issue in question, we would conclude that FWSD's have no authority to assess standby fees.

However, because of the history of standby fee legislation for other types of districts, we have previously taken the position that the imposition of standby fees by a FWSD would not require

prior approval by the Commissions's general supervisory powers. We have never referred this matter to the Commission because we have received no specific request to do so.

The fact that compelling arguments can be made to support and refute the authority regarding this practice speaks to an apparent necessity of clear, authoritative guidance on the issue. This may only be obtained through legislation or by a formal opinion rendered by the office of the Attorney General, or both.

We have been made aware of a recent request by Representative David Counts for an Attorney General Opinion with regard to the authority of a municipal utility districts to assess standby fees outside its designated boundaries. It may be appropriate to broaden this request to include the question of a FWSD's authority to impose standby fees.

Since both Senator Rodney Ellis and Representative Scott Hochberg are tracking this issue, it may be appropriate to request legislative assistance in this manner. Our office will continue to provide assistance as necessary.

I hope that you find this information helpful. If I may provide additional information, you may contact me at (512) 908-6100.

Sincerely,
s/Patrick King
Patrick King, Management Auditor
Water Utilities Division

cc:
Senator Rodney Ellis, Texas Senate
Representative David Counts, Texas House of R.
Representative Scott Hochberg, Texas House of R.
Wilbur Bradford, President, Bandera County FWSD
David Duncan, Director, Policy Research Division, TNRCC
Irene Montelongo, Senior Attorney, TNRCC
Sam Jones, P.E. Districts Administration, TNRCC
PO Box 13087 Austin, Tx 78711-3087 512 908-1000

Rudy Neira, Pro Se

10-2-97 TNRCC STATE AGENCY LETTER:

Barry R. McBee, Chairman
R.B."Ralph"Marquez, Commissioner
John M. Baker, Commissioner
Dan Pearson, Executive Director

Texas Natural Resource Conservation Commission
Protecting Texas by Reducing and Preventing Pollution
October 2, 1997

Mr. Wilbur L. Bradford
c/o Bandera County Fresh Water Supply District
9504 HWY 1283, Box 130
Lakehills, Texas 78063

Mr. Henry Steen, Jr. Attorney
Henry Gates Steen, Jr., P.C.
Steen Building Suite 306
3001 N. Lamar Blv.
Austin, Tx 78705

Re: Bandera County Fresh Water Supply District No. 1 (District); Standby Fees

Dear Sirs:

We have received your respective letters dated September 15, 1997 and September 17, 1997. Thank you for the additional information and comments concerning the District's standby fees and financial viability.

With respect to the documentation submitted with the letters, it does on seem sufficient to support the existence of the standby fee. The Contract of Deed from the Texas Land Co. does not show evidence of being recorded as a deed restriction which inures to the District. Neither of documents submitted has the capacity to negate the 1995 legislation which requires that the Commission approve

standby fees.

In our letter of September 5, 1997 we suggested, as an option, the discontinuance of the standby fee and the reaching of a settlement with the property owners. We, again, encourage the district to do that and to find an equitable revenue generating alternative. please contact Mr. Diego Abrego at 512 239-6170 if you have any questions.

Sincerely,

s/Samuel W. Jones, Manager

District Administration Section
Water Utilities Division

SWJ/DA/da

cc: Patrick Lindner

PO Box 13087 Austin, Texas 78711-3087 512/239-1000
Internet: www.tnrcc.state.tx.us

Rudy Neira, Pro Se

MARCH 25-98 PUBLIC INTEREST LETTER FROM THE REGIONAL CLEAN AIR & WATER ASSOCIATION:

REGIONAL CLEAN AIR AND WATER ASSOCIATION
PO BOX 6949
SAN ANTONIO, TX 7820

March 25, 1998

TO: SUPREME COURTS OF TEXAS AND THE UNITED STATES

The purpose of this letter is to express strong support for Supreme Court review of Neira v. Bandera County Fresh Water Supply #1 (District). (See Texas Supreme Court case #98-0015 and Texas Fourth Court of Appeals case #04-96-00739-CV.)

The District's water standby fee, currently imposed on Mr. Neira and other lot owners, appears to be a tax in disguise which is 20 times higher on vacant lot owners (who do not use water) as compared to home owners (who use water). This is a gross disparity.

The recent September 24, 1997 Texas Fourth Court of appeal ruling that "the District water standby fee is legal", is in serious conflict with both the Texas Constitution and the United States Constitution. This ruling, if left standing, could be a significant obstacle to fair water development.

This issue is of substantial continuing importance since demand for clean water throughout the United States appears to be increasing. Other taxing entities for water and other public services may similarly disguise unfair taxes as fees unless this point is settled by the Supreme Court.

s/Han Helland
Hans Helland, President
Regional Clean Air and Water Association

Rudy Neira, Pro Se